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Ramesh a/l Rajaratnam v Public Prosecutor

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HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO WA-42SC-2–09 OF 2019
AZHAR ABDUL HAMID JC
1 JUNE 2022

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Whether sessions court judge had plagiarised the prosecution's submissions — Whether trial judge had analysed and scrutinised evidence — Whether conviction safe — Whether appellate court could weigh, review or re-evaluate all evidence as trial court — Whether prejudicial to accused's right to fair trial — Capital Markets and Services Act 2007 — Criminal Procedure Code s 316

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Criminal Procedure — Judgment — Grounds of judgment — Whether grounds of judgment was a complete reproduction of the prosecution's submission — Whether grounds of judgment contained reasons for the decision — Whether trial judge's failure to address his mind independently to the available evidence in the grounds of judgment constituted a ground of appeal

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The appeal herein was against the decision of the sessions court which had convicted the appellant for three charges of insider trading under s 188(2)(a) of the Capital Markets and Services Act 2007 and sentenced the appellant to five years imprisonment and a fine of RM3m in default three years imprisonment for each charge. The three charges were related to the disposal of the appellant's own Malaysia Merchant Marine Bhd ('MMM') shares on 11 January 2010, 19 February 2010 and 22 February 2010 respectively. The appeal was based on the grounds that: (a) the sessions court judge ('SCJ') had plagiarised the prosecution's submission; (b) the SCJ did not analyse or scrutinise the evidence before him before coming to his decision; and (c) the conviction was unsafe as the SCJ simply and mechanically adopted the prosecution's submission with total disregard of a proper evaluation of the evidence as required by the law. The prosecution, on the other hand, submitted that this appeal was a continuation of a trial and, therefore urged this court to weigh, review or re-evaluate all the evidence available before it to determine the outcome of the present appeal as if this court was the trial court.

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Held, allowing the appeal and setting aside the convictions:

(1) The whole of the SCJ's grounds of judgment, with the exception of seven paragraphs, consisted of nothing but reproduction of the entire prosecution's submission. There was nothing to indicate the SCJ's train of

thoughts not the SCJ's reasoning before coming to the decision to call upon the appellant to enter his defence or to find the appellant guilty of the charges he faced. The prosecution's submission that the SCJ had meticulously addressed all the elements of the offence and set out all the defences proffered by the appellant despite a brazen wholesale importation of the prosecution's submissions did not hold water. There was not an iota of comments or reasoning that could be found that would indicate that any analysis or scrutiny of the evidence was carried out nor the reasons why the SCJ agreed with those submissions. The SCJ had copied wholesale the submission of the prosecution without putting nor addressing his mind independently and impartially to any of the evidence available before him, thus causing great prejudice to the appellant and could constitute a ground of appeal (see paras 22–23 & 26).

(2) For this court in its appellate capacity to embark on a journey to examine the evidence as if it was a court of first trial would deprive the appellant of his rights to a one trial + two appeals, thus causing prejudice to the appellant. In the circumstances, this was a fit and proper case for an appellate intervention as the right of the appellant to a fair and just trial had been greatly prejudiced (see paras 28 & 32).

[Bahasa Malaysia summary

Rayuan di sini adalah terhadap keputusan mahkamah sesyen yang telah mensabitkan perayu atas tiga pertuduhan pelaburan dalaman di bawah s 188(2)(a) Akta Pasaran Modal dan Perkhidmatan 2007 dan menjatuhkan hukuman penjara lima tahun dan denda sebanyak RM3 juta kepada perayu jika gagal bayar tiga tahun penjara bagi setiap pertuduhan. Ketiga-tiga pertuduhan tersebut adalah berkaitan dengan pelupusan saham Malaysia Merchant Marine Bhd ('MMM') perayu sendiri masing-masing pada 11 Januari 2010, 19 Februari 2010 dan 22 Februari 2010. Rayuan tersebut adalah berdasarkan alasan bahawa: (a) hakim mahkamah sesyen ('HMS') telah memplagiat hujahan pihak pendakwaan; (b) HMS tidak menganalisis atau meneliti keterangan di hadapannya sebelum membuat keputusan; dan (c) sabitan tersebut tidak dapat dipertahankan kerana HMS secara ringkas dan mekanikal menerima pakai penghujahan pihak pendakwaan dengan tidak menghiraukan penilaian yang sewajarnya terhadap keterangan seperti yang dikehendaki oleh undang-undang. Pihak pendakwaan, sebaliknya, menghujahkan bahawa rayuan ini adalah kesinambungan perbicaraan dan, oleh itu menggesa mahkamah ini untuk menimbang, menyemak atau menilai semula semua keterangan yang ada di hadapannya untuk menentukan keputusan rayuan sekarang seolah-olah mahkamah ini adalah mahkamah perbicaraan.

Diputuskan, membenarkan rayuan dan mengenepikan sabitan:

(1) Keseluruhan alasan penghakiman HMS, kecuali tujuh perenggan, tidak

mengandungi apa-apa selain pengemukaan semula keseluruhan penghujahan pihak pendakwaan. Tiada apa-apa yang menunjukkan pemikiran HMS mahupun alasan HMS sebelum membuat keputusan untuk memanggil perayu membela diri atau mendapati perayu bersalah atas pertuduhan yang dihadapinya. Hujahan pihak pendakwaan bahawa HMS telah menangani semua elemen kesalahan dengan teliti dan menyatakan semua pembelaan yang dikemukakan oleh perayu walaupun begitu banyak mencedok penghujahan pihak pendakwaan tidak dapat dipertahankan. Tiada sedikit pun komen atau alasan yang boleh didapati yang menunjukkan bahawa sebarang analisis atau penelitian terhadap keterangan telah dijalankan mahupun sebab mengapa HMS bersetuju dengan penghujahan tersebut. HMS telah menyalin secara menyeluruh penghujahan pihak pendakwaan tanpa meletakkan atau menangani fikirannya secara bebas dan saksama kepada mana-mana keterangan yang ada di hadapannya, dengan itu menyebabkan prejudis besar kepada perayu dan boleh menjadi alasan rayuan (lihat perenggan 22–23 & 26).

(2) Bagi mahkamah ini dalam kapasiti rayuannya untuk memulakan perjalanan untuk meneliti keterangan seolah-olah ia adalah mahkamah perbicaraan pertama akan melucutkan hak perayu untuk satu perbicaraan + dua rayuan, sekali gus menyebabkan prejudis kepada perayu. Dalam keadaan tersebut, ini adalah kes yang sesuai dan wajar untuk campur tangan rayuan kerana hak perayu untuk perbicaraan yang adil dan saksama telah sangat diprejudiskan (lihat perenggan 28 & 32).]

Cases referred to

Bank Bumiputra (M) Bhd v Aik Lee Feedmill Co Sdn Bhd & Ors [1999] 1 MLJ 529, HC (refd)

Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications [2013] 4 MLJ 351, FC (refd)

Dickson Levy a/l Maria George v PP [2018] MLJU 98; [2018] 1 LNS 135, CA (refd)

Letchumanan a/l Suppiah v PP and another appeal [2009] 5 MLJ 597, FC (refd)

Lim Chee Huat v PP [2019] 5 SLR 433, HC (refd)

Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, FC (refd)

Mohd Nazri bin Ismail v PP [2015] 1 MLJ 319, CA (refd)

Mohd Yusri bin Mangsor & Anor v PP and another [2014] 4 MLJ 875, CA (refd)

PP v Ma' arif [1969] 2 MLJ 65 (refd)

Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd [2012] 4 MLJ 149, CA (refd)

Periasamy s/o Sinnappan & Anor v PP [1996] 2 MLJ 557, CA (refd)

P'ng Hun Sun v Dato' Yip Yee Foo [2013] 6 MLJ 523, CA (refd)

A *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545, CA (refd)

Legislation referred to

Capital Markets and Services Act 2017 s 188(2)(a)
B Courts of Judicature Act 1964
Criminal Procedure Code s 316

Gurdial Singh Nijar (with Paul Aisu, Joshua Andran and Abraham Au Tian Hui) (Law Office of Paul) for the appellant.
C *Ashley bin Tajuddin (with Munira Masood and Daniel Arif Tung) (Securities Commission Malaysia) for the respondent.*

Azhar Abdul Hamid JC:

D INTRODUCTION

[1] The appeal herein is against the decision of the sessions court which had convicted the appellant ('the accused') for three charges of insider trading under s 188(2)(a) of the Capital Markets and Services Act 2017.
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[2] The three charges are related to the disposal of the accused's own shares of: (1) 5,000,000; (2) 201,300; and (3) 4,999,500 units of Malaysian Merchant Marine Bhd ('MMM') shares on 11 January 2010, 19 February
F 2010 and 22 February 2010 respectively.

[3] Upon convicted, the accused was sentenced to five years imprisonment and a fine of RM3m (in default three years imprisonment) for each charge.

G BACKGROUND

[4] The accused was the Executive Deputy Chairman of MMM, a public listed company with the principle activities of shipping services, ship management and ship catering services. He also acted as Chief Executive
H Officer (CEO) and Chief Financial Officer (CFO) of the said company.

[5] The accused was also a substantial shareholder of MMM, holding 10,245,000 shares of MMM.

I **[6]** To fund its activities, MMM had taken out borrowings in the form of Islamic debt securities called Al-Bai Bithaman Ajil Islamic Debt Securities (BaIDS) in 2004. In addition to this, MMM was also one of the issuers of a RM40m Prima Uno's Collaterised Loan Obligation (CLO), a programme providing medium to small size companies who are unable to issue debt on its

own but to combine its loan to a sizeable size for investors to invest in.

[7] In 2008, MMM announced its proposal for early redemption of the said BaIDS of which RM24m was still outstanding. In order to come up with this amount, MMM sought to dispose one of its vessels, MMM Ashton to a buyer from the Philippines.

[8] On 4 February 2010 the Malaysian Rating Corp Bhd (MARC) which is a rating agency appointed as the rating agency to rate the BaIDS, downgraded MMM's BaIDS from A- (investment grade) to BB+ (non-investment grade).

THE APPEAL

[9] Before me learned counsel ('LC') for the accused advanced various grounds of appeal;

A. Plagiarism by the Learned Sessions Court Judge (LSJ)

This was highlighted by LC for the Accused at Appendix A of his written submission, at pages 37–154, where the LSJ had copy-pasted almost wholesale of the prosecution's submission. The Learned Deputy readily conceded to this fact though was quick to put on record that they had no role in preparation of the said grounds of judgment.

[10] This court was urged by LC for the accused to set aside the conviction based on this ground alone as according to his submission, it clearly shows that the LSJ did not analyse or scrutinise the evidence before him before coming to his decision. It was argued that the conviction is unsafe as the LSJ simply and mechanically adopts the prosecution's submission with total disregard of a proper evaluation of the evidence as required by the law.

[11] The learned deputy on the other hand submitted this appeal is a continuation of a trial, therefore urged this court to weigh, review or reevaluate all the evidence available before it to determine the outcome of the present appeal as if this court is the trial court. Reference was made to s 316 of the Criminal Procedure Code ('the CPC') and a Singapore High Court decision of *Lim Chee Huat v Public Prosecutor* [2019] 5 SLR 433.

[12] LC for the accused on the other hand submitted that s 316 CPC confers upon this court as an appeal court the power to consider whether there is sufficient ground for interfering with the decision of the trial court. Should this court took the role of a trial court in view of the plagiarised grounds of judgment, then this court would effectively be denying the accused of his right to one trial + two tiers of appeal. This would deprive the accused of due process of the law and seriously prejudice him.

[13] In support of his submission on this issuer LC for the accused quoted the decision of Federal Court in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 where Mokhtar Abdullah FCJ held that a harmonious construction of the Federal Constitution read with the Courts of Judicature Act 1964, clearly envisaged a structure of one trial + two appeals for litigants to access legal redress. See also *Letchumanan a/l Suppiah v Public Prosecutor and another appeal* [2009] 5 MLJ 597 and *Bank Bumiputra (M) Bhd v Aik Lee Feedmill Co Sdn Bhd & Ors* [1999] 1 MLJ 529.

[14] It was further submitted that this was not an issue in the case of *Lim Chee Huat* quoted by the learned deputy and that this court is not bound by that decision as it is a decision of the Singapore High Court.

[15] Having scrutinised the LSJ's grounds of judgment, I found that out of 119 pages and 234 paragraphs of his grounds of judgment, the only paragraphs which are not copied and pasted from the prosecution's submission are as follows:

(a) para 1 at p 4: under the heading 'OFFENCE & PUNISHMENT';

(b) para 6–9 at pp 6–9: under the heading 'BURDEN AT THE END OF PROSECUTION CASE';

(c) para 155 at p 75: where the LSJ stated that the court adopted the whole of the analysis and finding of PW15 for the whole case so as to avoid repetition;

(d) para 157 at pp 75–76: where the court made a finding that a prima facie case had been proven by the prosecution;

(e) para 158 at p 76: where it was stated that OKT elected to give sworn evidence;

(f) para 233 at p 118: under the heading 'FINDING' the LSJ decided that the accused had failed to raise a reasonable doubt and the prosecution had proved its case beyond reasonable doubt; and

(g) para 234 at p 118: under the heading 'SENTENCE'.

[16] Having discovered this situation, I find that the grounds of judgment is beyond a non-speaking judgment. It was a complete reproduction of the prosecution's submission with parts of them copied verbatim and in toto, for example at para 204 of the LSJ's grounds of judgment; 'As we have argued above ...', at para 208: 'It is our submission ...', and a few other instances at paras 210, 217, 218 and 228.

[17] The LSJ did not, anywhere in his judgment conduct any meaningful analysis or scrutiny of the evidence adduced and available before him. Even at

para 155 of his judgment when he decided to accept PW15's analysis and finding, no reasoning for such decision can be found in his judgment.

LAW ON APPELLATE INTERVENTION

[18] Section 316 of the CPC provides for the duty of a court hearing an appeal from a subordinate court.

[19] The situations where appellate intervention is warranted is clearly laid down in *Mohd Yusri bin Mangsor & Anor v Public Prosecutor and another* [2014] 4 MLJ 875, a judgment written by Mohd Zawawi Salleh JCA (as he then was), (see also *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805; *P'ng Hun Sun v Dato' Yip Yee Foo* [2013] 6 MLJ 523 (CA); *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149 (CA); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA); and *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557 (CA)).

[20] At the same time I am also well aware of the higher courts' decision that an appeal is, in actual fact a continuation of a trial. However, these decisions discussed about the appellate courts duty in examining the findings made by the trial courts, and whether these findings were accurately based on the facts and law of those particular cases.

[21] Abdul Hamid J (as he then was) in the case of *Public Prosecutor v Ma' arif* [1969] 2 MLJ 65 said:

> An appeal is merely a continuation of a trial, and throws open all the evidence to re-examination in order to determine whether or not the various findings of the court are correct.

See also the case of *Dickson Levy a/l Maria George v Public Prosecutor* [2018] MLJU 98; [2018] 1 LNS 135.

[22] Coming back to the present appeal, at the risk of repeating myself, the whole of the LSJ's ground of judgment, with the exception of seven paragraphs stated at para [15] above, consist nothing but reproduction of the entire prosecution's submission. There was nothing to indicate his train of thoughts, nor his reasoning before coming to his decision to call upon the accused to enter his defence or to finding the accused guilty of the charges he faced.

[23] The learned deputy's submission that the LSJ had meticulously address all the elements of the offence and set out all the defences proffered by the accused despite a brazen wholesale importation of the prosecution's

submissions, in my opinion does not hold water. There was not an iota of comments or reasoning that could be found that would indicate any analysis or scrutiny of the evidence was carried out nor the reasons why he agreed with those submissions.

[24] In an article commenting the case of *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications* [2013] 4 MLJ 351, Tan Sri Idrus Harun noted as follows;

> One thing which seems clear from the decision of the Federal Court in this case, is that, while the practice is not encouraged, *there is nothing inherently wrong with adopting the submissions of a party in whole or in part as the reason for the judgment so long as those submissions truly and accurately reflect the judge's own independent analysis and conclusions.* (Emphasis added.) (Judicial Recusal, Journal of the Malaysian Judiciary, July 2017, p 46 at p 71).

[25] In the case of *Mohd Nazri bin Ismail v Public Prosecutor* [2015] 1 MLJ 319 the Court of Appeal stated:

> [35] We wish to refer to the case of *Cojocaru v British Columbia Women's Hospital and Health Center* [2013] 2 SCR 357. In that case, the main question in the appeal before the Supreme Court of Canada was whether a trial judge's decision should be set aside because his reasons for judgment incorporated large portions of the plaintiff's submission ... His Lordship said further:
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> > To sum up, extensive copying and failure to attribute outside sources are in most situations practices to be discouraged. But lack of originality and failure to attribute sources do not in itself rebut the presumption of judicial impartiality and integrity. This occurs only if the copying is of such a character that a reasonable person appraised of the circumstances would conclude that the judge did not put her mind to the evidence and the issues and did not render an impartial, independent decision.
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> Thus, the Supreme Court concluded that whilst it is desirable that the judge express their conclusion in their own words, incorporating substantial amounts of material from submissions or other legal sources into reasons for judgment does not, without more, permit the decision to be set aside. *Only if the incorporation is such that a reasonable person would conclude that the judge did not put her mind to the issues and decide them independently and impartially as she was sworn to do, can that judgment be set aside*. (Emphasis added.)

[26] Having scrutinised the grounds of judgment of the LSJ, I came to the painful conclusion that what the LSJ did was merely copying wholesale the submission of the prosecution without putting nor addressing his mind independently and impartially to any of the evidence available before him, thus causing great prejudice to the accused and can constitute a ground of appeal. See *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications* [2013] 4 MLJ 351.

[27] This situation, in my opinion constitute a ground of appeal by itself.

[28] I am also in agreement that for this court in its appellate capacity to embark in a journey to examine the evidence as if it is a court of first trial, as submitted by LS for the accused, would deprive the accused of his rights to a one trial + two appeals, thus causing prejudice to the accused.

[29] Mokhtar Abdullah FCJ in the case of *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 held that a harmonious construction of the Federal Constitution read with the Courts of Judicature Act 1964 clearly envisaged a structure of one trial + two appeals for litigants to access legal redress:

> A harmonious interpretation of art 128(3) vis a vis art 121(2)(a) of the Federal Constitution, will promote the purpose or object of the law providing a three-tiered pyramidal judicial system of 'one trial + two appeals' as envisaged in the Constitution and structured accordingly in the CJA.

[30] The same was echoed by Suriyadi J in the case of *Bank Bumiputra (M) Bhd v Aik Lee Feedmill Co Sdn Bhd & Ors* [1999] 1 MLJ 529.

[31] Hashim Yusoff FCJ in the case of *Letchumanan a/l Suppiah v Public Prosecutor and another appeal* [2009] 5 MLJ 597 stated:

> It is also my considered view that the respondent is not prejudiced if this court were to allow the public prosecutor's appeal at this stage of the trial by reversing the Court of Appeal's decision and calling upon the respondent to make his defence on the original trafficking charge because he would still have the right and the chance to raise a reasonable doubt in the prosecution case. Even if he were to be found guilty and then convicted on the trafficking charges, the respondent would still have his right to appeal to the Court of Appeal and further to the Federal Court. The respondent would still not be deprived of *the right provided by the law for the two tiers of appeal* (see *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 at p 429).

CONCLUSION

[32] Based on the discussion above, I find that this is a fit and proper case for an appellate intervention as clearly the right of the accused for a fair and just trial has been greatly prejudiced.

DECISION

[33] The appeal by the accused is allowed, the conviction against the accused on all three charges is set aside and any fines paid is to be refunded forthwith.

A *Appeal allowed and convictions set aside.*

Reported by K Selvaraju

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